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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

EX PARTE SULIA LAWRENCE BROWN

ON DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS
NO. 02-19-00064-CR

ON APPEAL FROM THE CRIMINAL DISTRICT COURT ONE
TARRANT COUNTY, TEXAS
CAUSE NO. 1503867

RESPONDENT'S BRIEF ON THE MERITS

Oral Argument is Requested

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ATTORNEY FOR RESPONDENT

IDENTITY OF JUDGE(S), PARTIES AND COUNSEL

• The parties to the trial court's judgment are the State of Texas and Respondent, Mr. Sulia Lawrence Brown.

• The trial judges were the Honorable Elizabeth Beach (elected judge of the Criminal District Court No. 1, Tarrant County, Texas) and the Honorable Nelda Cacciotti, magistrate.

• Counsel for the State at trial were Tarrant County Criminal District Attorney Sharen Wilson and Assistant Criminal District Attorneys Riley Shaw, Ashlea B. Deener, and Andréa Jacobs, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

• Counsel for the State on appeal in the court of appeals and before this Court is Tarrant County Criminal District Attorney Sharen Wilson and Assistant Criminal District Attorney Joseph Spence and Andréa Jacobs, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

• Counsel for Respondent at trial was Taylor Ferguson, 300 Burnett St., Ste. 124, Fort Worth, Texas 76102.

• Counsel for Respondent on appeal in the court of appeals and before this Court is Wes Ball, 4025 Woodland Park Blvd, Ste. 370, Arlington, Texas 76013.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

PENDING CHARGES

Respondent was charged by juvenile petition on May 23, 2012 at the age of 12 with the felony offense of aggravated sexual assault of a child under 14 years of age in cause number 323-96615-J12. (CR. I, 21-23). Over five years later, upon turning 18 years of age, a felony complaint was filed by the State on July 5, 2017 styled *The State of Texas v. Sulia Lawrence Brown*, in cause number 1503867 pursuant to Tex. Family Code §55.44. (CR. I, 6).

Respondent challenged his restraint pursuant to Article 5, Section 8 of the Texas Constitution which became unlawful upon his achieving his 19th birthday on May 26, 2019. This challenge was raised in his Application for Writ of Habeas Corpus which was filed on June 13, 2018. (CRI, 15-20). After hearing, the trial court entered an order denying Respondent relief. (CR. I, 68-67).

Respondent appealed the trial court's decision denying him relief. The Second Court of Appeals issued its decision and written published opinion reversing the decision of the trial court. (Kerr, Birdwell, and

Bassell, JJ.). This Court granted the State's Petition for Discretionary Review. Respondent remains committed to a State facility with an intellectual disability having been judged to be "unfit to proceed" and later the adult equivalent "incompetent to stand trial" due to intellectual disability.[1]

[1] The term mental retardation has largely been replaced with the term intellectually disabled. Accordingly, statutes will use one of these terms referring to the same disability. *See* Texas Acts of the 84th Leg. - Regular Session (2015)SB 219, Chapter 1.

STATEMENT REGARDING ORAL ARGUMENT

The Court in granting the State's Petition for Discretionary Review determined that oral argument would not be permitted. Respondent urges this Honorable Court to permit oral argument. In the Court below, oral argument was of significant benefit to the Court in this case of first impression. Tex. R. App. Proc. 39.1(d). 39.2.

ISSUES PRESENTED

This Court granted review on the following two issues:

> Article 46B.0095 of the Texas Code of Criminal Procedure allows for commitment of an incompetent defendant for the "maximum term provided by law for the offense for which the defendant was to be tried." The maximum term of confinement for a juvenile adjudicated for a first-degree felony offense is forty years if the State obtains grand jury approval for a determinate-sentence. What, then, is "the maximum term provided by law" for determining the length of mental-health commitment for a juvenile who is accused of a crime severe enough to be determinate-sentence eligible but is found unfit to proceed before a grand jury could make a determinate-sentence finding? [CR 11, 32-33, 46, 49]
>
> Should the Second Court of Appeals have considered the State's defense that it was prohibited from pursuing a determinate-sentence finding from the grand jury because the juvenile was found unfit to proceed and the judicial proceedings were stayed as a matter of law? [CR 49]
>
> Petition for Discretionary Review at 3.

STATEMENT OF FACTS

The Statement of Facts set out in the State's Brief on the Merits is accurate and will not be repeated here.

SUMMARY OF THE ARGUMENT

On the first issue for which this Court granted review, the State is arguing that under Article 46B.0095 of the Texas Code of Criminal Procedure, the "maximum term provided by law for the offense for which the defendant was to be tried" is 40 calendar years. Another way of phrasing it is that the State is entitled to hold an intellectually disabled individual in custody for 40 calendar years, from the age of 12 years to the age of 52 years without trial, without a grand jury approving a determinate sentence and with no intervening due process.

On the second issue for which this Court granted review, the State is arguing that they should be excused from the steps necessary to make the maximum term provided by law 40 calendar years.

ARGUMENT

I.

The State argues on its first point that the Court of Appeals erred in determining that the "maximum term provided by law" does not include the determinate sentence range when the State has not sought a determinate sentence approval from a Grand Jury and consequently, a

Grand Jury has made no determinate sentence decision. Section 53.045 Tex. Family Code is the statute governing the determinate sentence procedure that would be required to continue to detain Respondent beyond his 19th birthday. This statute provides that the State *may* present the juvenile petition to the grand jury if the juvenile petition alleges certain enumerated offenses which includes aggravated sexual assault of a child as alleged against Respondent.

> (d) If the grand jury approves of the petition, the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case. For the purpose of the transfer of a child to the Texas Department of Criminal Justice as provided by Section 152.00161(c) or 245.151(c), Human Resources Code, as applicable, a juvenile court petition approved by a grand jury under this section is an indictment presented by the grand jury.
> Tex. Fam. Code § 53.045(d)

The State concedes it did nothing to seek a determinate sentence approval and has not for at least seven years. The State premises its argument and its entitlement to hold Respondent in custody for four decades on the future speculation that should he ever attain mental competency to stand trial, they would then be free to go to a Grand Jury and would actually do so, would be certain to obtain Grand Jury approval for a determinate sentence, would then proceed to trial, would then obtain the equivalent of a guilty verdict, and would additionally persuade

a jury to impose the "maximum term provided by law" of 40 years as opposed to a lesser punishment. It is upon this unstable foundation that the State rests its argument.

This Court should reject the State's invitation to approve confinement of a person for what essentially amounts to the majority of his life. While this is not a right to a speedy trial case, the prejudice for prolonged confinement without trial creates the same prejudice (1) oppressive pretrial incarceration, (2) anxiety or concern related to the pending criminal charges, (3) impairment of the accused's defense. State v. Shaw, 117 S.W.3d 883 (Tex. Crim. App. 2003) citing Barker v. Wingo, 407 U.S. 514, 532 (1972). It is unlikely the legislative history that chose the poorly worded phrase "maximum term *possible* for the offense" contemplated the circumstances we are confronted with here. In any event, the statute enacted did not use the term "possible" and instead chose the term "maximum term *provided by law*." "We have a duty to narrowly construe statutes to avoid constitutional violation." State v. Cortez, 543 S.W.3d 198, 206 (Tex. Crim. App. 2018).

The State's failure to seek a determinate sentence by filing a petition and seeking grand jury approval renders the maximum period

for which he can be detained to expire on his 19th birthday. Hum Res. Code § 254.151(d), (e). The first hurdle that is likely insurmountable is whether this intellectually disabled person will *ever* achieve competency to endure any of these other speculative proceedings. In the Court below findings of fact, it finds "There is no evidence, or allegation, that Applicant will regain competency." Finding of Fact 19 and 31. (CR. I, 71).

At the hearing on habeas corpus in the trial court, the prosecutor (Shaw) put it correctly regarding the Grand Jury, "And so they are making the jurisdictional -- they're making the determination of what that punishment range is." Writ Hearing at 21. Here the State concedes that it is the Grand Jury that determines what the punishment range is and that the Court has no jurisdiction to impose a 40 year sentence. "Without certification of grand jury approval, and the entry of such certification into the record of the case, the trial court was without jurisdiction to impose a determinate sentence." Matter of S.D.W, 811 S.W.2d 739, 744 (Tex. App. – Houston [1st] 1991, no writ).

A Grand Jury presentation also provides some intervening due process in that there is at least a determination that there is "probable cause" that the offense was committed. To date, no determinative

sentence has been sought, much less grand jury approval obtained. To date, nothing resembling process that is due has been provided. What the State is saying is that they can imprison a person for forty (40) calendar years without a single intervening decision, hearing, judgment or other due process or due course of law[2] to determine that there is even "probable cause' to believe the prisoner committed any offense. Having failed to do so, as it stood on Respondent's 19th birthday and as it stands now, he should have been released.

II.

On the second issue on which this Court granted review, the State raises as a "defense" to its neglect and inaction that the stay issued by the Juvenile Court prevented them from presenting to a Grand Jury the issue of approval of a determinate sentence for at least 7 years.[3] Nowhere does the Texas Family Code or its corresponding Code of Criminal Procedure provision stay unilateral grand jury proceedings, the unilateral presentment of a juvenile Petition to a grand jury, or a decision

[2] Clearly due process under the 5th Amendment to the United States Constitution and due course of law under Article 1, Section 19 of the Texas Constitution are implicated.

[3] There is a stay provision applicable to a person deemed incompetent to stand trial in the Adult Procedural Code, Article 46B.004(d).

of a grand jury to approve a Petition for treatment as a determinate sentence.

A Grand Jury proceeding is not a "juvenile proceeding." A Grand Jury acts independently of the Courts. The State is arguing that where a person is mentally incompetent to stand trial absolutely nothing can occur. The breadth of the terminology that juvenile proceedings are stayed was addressed in Texas Department of Mental Health & Mental Retardation v. Wade, 651 S.W.2d 927, 928 (Tex. App. – Dallas 1983, no writ). The Court rejected the Attorney General's reasoning that Tex. Fam. Code §55.03(d)[4] prevented the District Attorney from enjoining the State School. "Concededly, the Family Code does stay juvenile proceedings, but those are the only proceedings held in abeyance when the child is found to be mentally retarded and committed to a residential care facility." Grand juries continue to operate and issue indictments for adults who have been deemed incompetent to stand trial and are confined in hospitals. There is no authority that grand juries must stand down until competency has been restored.

[4] §55.03(d) Texas Family Code (Vernon 1975) If the juvenile court orders commitment of a child to a facility for the care and treatment of mentally retarded persons, the proceedings under this title then pending in juvenile court shall be stayed.

The State relies on Texas Family Code §55.32(f) which provides that

> (f) If the court or jury determines that the child is unfit to proceed as a result of mental illness or an intellectual disability, the court shall: (1) stay the juvenile court proceedings for as long as that incapacity endures; and (2) proceed under Section 55.33

Significantly, what is "stayed" is "juvenile court proceedings." The unilateral actions of the State or a grand jury are not directed to be stayed. It is interesting to note that the very next provision in Tex. Fam. Code 55.32 is:

> (g) The fact that the child is unfit to proceed as a result of mental illness or an intellectual disability does not preclude any legal objection to the juvenile court proceedings which is susceptible of fair determination prior to the adjudication hearing and without the personal participation of the child.

This provision clearly contemplates that there may be actions occurring with regard to the juvenile that do not require his participation. There are a considerable number of activities related to the legal case of the juvenile that may be simultaneously occurring. While not an exhaustive list, certainly the parties can engage in pretrial discovery matters and do not have to stand down during the child's period of unfitness. Evidence may be exchanged and reviewed. Pretrial motions may be filed and, in some instances, presented and ruled upon without

requiring the personal participation of the child. The logic of this is inescapable. It is matters for which the child must be present and also be present during a period of his mental competency that must be shut down and stayed, namely "juvenile court proceedings."[5]

In United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735 (1992) the Supreme Court noted the historical function of a grand jury.

> [R]ooted in long centuries of Anglo-American history," *Hannah v. Larche,* 363 U.S. 420, 490, 80 S.Ct. 1502, 1544, 4 L.Ed.2d 1307 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It " 'is a constitutional fixture in its own right.' " *United States v. Chanen,* 549 F.2d 1306, 1312 (CA9 1977) (quoting *Nixon v. Sirica,* 159 U.S.App.D.C. 58, 70, n. 54, 487 F.2d 700, 712, n. 54 (1973)), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977). In fact, the whole theory of its function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people. See *Stirone v. United States,* 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960); *Hale v. Henkel,* 201 U.S. 43, 61, 26 S.Ct. 370, 373, 50 L.Ed. 652 (1906); G. Edwards, The Grand Jury 28-32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the judicial branch has traditionally been, so to speak, at arm's length.
> Id. At 47

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[5] The State argues that the grand jury approval of a determinant sentence must be filed by the State. The statute does not say that or state that "the fact of the approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case is a pleading of the State." Tex. Family Code 53.045.

A grand jury is not a branch of government. It is mentioned in Article 1, Section 10 of the Texas Constitution. The Supreme Court went on to say

> The grand jury requires no authorization from its constituting court to initiate an investigation, see Hale, supra, 201 U.S. at 59-60, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. See Calandra, supra, 414 U.S. at 343.

The State argues that a determinate-sentence approval is "irrelevant" to identify the "maximum term." They raise this as a "defense"[6] to their inaction, miscalculation, or recognition that a grand jury would never approve a determinate sentence for Respondent. For consideration is whether the State, unable to successfully obtain a determinate sentence approval from a grand jury in the early years of Respondent's incarceration, could wait 35 years and gather additional bad acts occurring long after charges have been brought to increase the chance of securing a determinate sentence approval they could not have otherwise been able to achieve and when Respondent is no longer a child.

[6] Counsel has been misled all of these years that failure to object waived error on appeal and had no idea that defenses could be raised for inaction in the trial court.

Regarding transferring juveniles to the adult court system, this Court has admonished that few circumstances justify transferring a child from juvenile to criminal court:

> The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded the exception, not the rule: the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system.
>
> Moon v. State, 451 S.W.,3d 28, 36 (Tex. Crim. App. 2014). See also Kent v. United States, 383 U.S. 541 (1966).

PRAYER

Respondent prays that the judgment of the Court of Appeals be affirmed and that Respondent's pre-trial application for writ of habeas corpus should be granted.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

In compliance with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that the Respondent's Brief was prepared using Microsoft Word, and according to that program's word count function, the document contains 2598 words.

/s/ Wes Ball
WES BALL
Attorney for Respondent

CERTIFICATE OF SERVICE

On this the 2nd day of July 2020, a true and correct copy of the above and foregoing Respondent's Brief on the Merits delivered electronically to the Post-Conviction Division of the Tarrant County District Attorney's Office and to the State Prosecuting Attorney, Ms. Stacey M. Soule.

/s/ Wes Ball
WES BALL
Attorney for Respondent

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